

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

**2012 MSPB 61**

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Docket No. DA-0752-09-0172-M-1

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**Sherman Howard,  
Appellant,**

**v.**

**Department of the Air Force,  
Agency.**

April 26, 2012

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Marshall D. White, Esquire, San Antonio, Texas, for the appellant.

Charles R. Vaith, Esquire, Lackland Air Force Base, Texas, for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman  
Anne M. Wagner, Vice Chairman

**OPINION AND ORDER**

¶1 This case is before the Board on remand from the United States Court of Appeals for the Federal Circuit, which granted the agency's motion to remand the Board's July 26, 2010 decision in this matter for further proceedings in light of *Ward v. U.S. Postal Service*, [634 F.3d 1274](#) (Fed. Cir. 2011). For the following reasons, we VACATE the Board's prior decisions in this matter and DO NOT SUSTAIN the appellant's removal.

**BACKGROUND**

¶2 Effective November 20, 2008, the agency removed the appellant from the position of Auditor, YA-511-02, based on the following charges: (a) use of

government resources for personal gain; (b) outside employment during paid duty hours; (c) falsification of material facts and deliberate misrepresentation; (d) threatening bodily harm (two specifications); and (e) failure to disclose outside employment. *Howard v. Department of the Air Force*, [114 M.S.P.R. 482](#), ¶ 2 (2010). In the appellant's subsequent appeal, the Board found that the record reflected that the deciding official had erroneously considered the appellant's allegedly poor performance as an aggravating factor weighing in favor of removal, even though the proposal notice did not mention the appellant's poor performance as an aggravating factor. *Id.*, ¶ 6. In order to remedy the agency's error in relying on the appellant's allegedly poor performance as a factor in its penalty analysis without including it in the notice of proposed removal, the Board conducted its own penalty analysis. *Id.* Considering all the relevant factors, the Board found the penalty within the bounds of reasonableness and affirmed the agency's action. *Id.*, ¶¶ 7-8.

¶3 The appellant then filed a petition for review of the Board's final decision with the United States Court of Appeals for the Federal Circuit, which granted the agency's subsequent motion to remand the case to the Board for further proceedings in light of *Ward v. U.S. Postal Service*, [634 F.3d 1274](#) (Fed. Cir. 2011). *Howard v. Department of the Air Force*, 452 F. App'x 965 (Fed. Cir. 2011).

### ANALYSIS

¶4 The agency did not refer to the appellant's allegedly poor performance in its September 29, 2008 notice of proposed removal. Initial Appeal File (IAF), Tab 7, Subtab 4f. Nevertheless, in his written *Douglas* factors analysis, the deciding official explicitly considered the appellant's allegedly poor performance as an aggravating factor. *Id.*, Subtab 4b at 2. Moreover, the deciding official testified that he considered the appellant's performance and productivity issues in making his decision to remove the appellant. Hearing Transcript (HT), June 18,

2009 at 37, 59. The deciding official specifically testified that the appellant's poor performance was "a contributing factor" in the decision to remove him. *Id.* at 59. Thus, because the deciding official considered information that was not included in the notice of proposed removal, we find that the deciding official relied on ex parte information in his decision to remove the appellant. *See Lopes v. Department of the Navy*, [116 M.S.P.R. 470](#), ¶¶ 9-10 (2011). However, such ex parte information will only violate an employee's right to due process when it introduces new and material information to the deciding official. *Ward*, 634 F.3d at 1279; *Stone v. Federal Deposit Insurance Corporation*, [179 F.3d 1368](#), 1377 (Fed. Cir. 1999).

¶5 In order to determine whether the deciding official's consideration of this ex parte information constituted a due process violation, we must inquire whether the ex parte information is so substantial and so likely to cause prejudice that no employee can fairly be required to be subjected to a deprivation of property under such circumstances, and the Board will consider, among other factors: (1) whether the ex parte information merely introduces "cumulative information" or new information; (2) whether the employee knew of the error and had a chance to respond to it; and (3) whether the ex parte information was of the type likely to result in undue pressure upon the deciding official to rule in a particular manner. *Ward*, 634 F.3d at 1279; *Stone*, 179 F.3d at 1377. Importantly, our reviewing court explained in *Ward* that "[t]here is no constitutionally relevant distinction between ex parte communications relating to the underlying charge and those relating to the penalty." *Ward*, 634 F.3d at 1280.

¶6 The ex parte information at issue related to the assertion by the agency that the appellant's audit production was much lower than other journeyman auditors, specifically that his four year output was less than the agency's individual production goal for a single year and generally that his performance was poor. IAF, Tab 7, Subtab 4g at 4, 10-11. We find that this information is not cumulative because it concerned specific information of alleged performance

deficiencies of which the appellant was not given notice and an opportunity to respond in this action. *See Silberman v. Department of Labor*, [116 M.S.P.R. 501](#), ¶ 12 (2011); *see also Stone*, 179 F.3d at 1376 (procedural due process guarantees are not met if the employee has notice only of certain charges or portions of the evidence relied upon by the agency). Moreover, in a situation like this, where the deciding official has admitted that the ex parte information influenced his penalty determination, the information in question is clearly material. *See Silberman*, [116 M.S.P.R. 501](#), ¶ 12 (citing *Ward*, 634 F.3d at 1280 n.2). We further find that, because the agency omitted this information from the notice of proposed removal, IAF, Tab 7, Subtabs 4f, the appellant was unaware that the deciding official would consider it and had no chance to respond before the deciding official issued his decision. With respect to whether the information resulted in undue pressure on the deciding official, the Federal Circuit has recognized that the absence of such pressure may be less relevant when, as in this case, the deciding official admits that the information influenced his penalty determination. *Ward*, 634 F.3d at 1280 n.2; *see* IAF, Tab 7, Subtabs 4a at 3, 4b at 2-3; HT, June 19, 2009 at 37, 59. Therefore, we find that the deciding official's consideration of such aggravating factors without the appellant's knowledge was "so likely to cause prejudice that no employee can fairly be required to be subjected to a deprivation of property under such circumstances." *Stone*, 179 F.3d at 1377.

¶7 Consequently, because the agency violated the appellant's due process guarantee to notice, the agency's error cannot be excused as harmless, and the appellant's removal must be cancelled. *Lopes*, [116 M.S.P.R. 470](#), ¶ 13. The agency may not remove the appellant unless and until he is afforded a new "constitutionally correct removal procedure." *Id.* Accordingly, we VACATE the

Board's prior decisions in this matter and DO NOT SUSTAIN the removal action.\*

### ORDER

¶8 We ORDER the agency to cancel the appellant's removal and to restore the appellant effective November 20, 2008. *See Kerr v. National Endowment for the Arts*, [726 F.2d 730](#) (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶9 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶10 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* [5 C.F.R. § 1201.181](#)(b).

¶11 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not

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\* In cancelling the appellant's removal, we make no findings with respect to the agency's charges.

fully carried out the Board's Order, and should include the dates and results of any communications with the agency. [5 C.F.R. § 1201.182](#)(a).

¶12 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶13 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113](#)(c)).

NOTICE TO THE APPELLANT  
REGARDING YOUR RIGHT TO REQUEST  
ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at [5 C.F.R. §§ 1201.201](#), 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING  
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, [www.cafc.uscourts.gov](http://www.cafc.uscourts.gov). Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer  
Clerk of the Board  
Washington, D.C.



## **DFAS CHECKLIST**

### **INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD**

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT  
CASES

### **CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:**

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

### **ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:**

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
  - a. Outside earnings with copies of W2's or statement from employer.
  - b. Statement that employee was ready, willing and able to work during the period.
  - c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.





## **NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES**

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts.

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.
2. The following information must be included on AD-343 for Restoration:
  - a. Employee name and social security number.
  - b. Detailed explanation of request.
  - c. Valid agency accounting.
  - d. Authorized signature (Table 63)
  - e. If interest is to be included.
  - f. Check mailing address.
  - g. Indicate if case is prior to conversion. Computations must be attached.
  - h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

### **Attachments to AD-343**

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)
2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.
3. Outside earnings documentation statement from agency.
4. If employee received retirement annuity or unemployment, provide amount and address to return monies.
5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)
6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.
7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

- a. Must provide same data as in 2, a-g above.
- b. Prior to conversion computation must be provided.
- c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.